

COUNTRY REPORT: BOTSWANA

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I. INTRODUCTION

In its earliest beginnings, the system of Botswana law rested upon protection of victims and community involvement in the solution of conflicts. Most penal sanctions were therefore directed towards compensation and restitution for the victim. Over the past few decades however, the role of the victim became increasingly marginalized with the evolution of the modern system of justice and the increasing complexities of society. During this time crime was stolen from the victim and became the property of the state. Victims' concerns were subsumed within the public interest that guides prosecution and penal decisions.

In contemporary criminal justice, the victim is re-emerging as a much more representative character whose feelings must be considered. The new imperative is that victims must be protected, their voices heard, their memories honoured, their anger expressed and their fears addressed. As American psychologist Frederick Wertahm (cited in Fattah 1989:45) rightly notes "One cannot understand the psychology of the murderer if one does not understand the sociology of the victim".

The purpose of this paper is to give an analysis of the current situation, problems and effective countermeasures in relation to the protection of victims of crime and abuse of power in the Botswana Criminal Justice Process. It does so by critically examining the extent to which the Justice Process in Botswana takes measures to ensure the use and application of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

While it could be argued that Botswana has made substantial progress in acceding to international policies and laws there is still a noticeable gap. Certain aspects of the Declaration have been fused into Botswana's domestic laws such as the Constitution, Penal Code, Criminal Procedure & Evidence Act and the Children's Act. The fundamental freedoms and basic human rights of the individual are enshrined in the country's Constitution, which is also the supreme law of the country even though there seems to be a gap between policy and practice as demonstrated in the report.

The amendment of the Criminal Procedure & Evidence Act (CP & E), which introduced in-camera hearings in courts for sexual offences, is a worthy commitment creating a victim friendly system that protects rather than victimizes.

The area where the criminal Justice process of this country has a lot to improve upon is Juvenile Justice. This paper will demonstrate that there is a general lack of uniformity in various statutes affecting children's welfare. The absence of support centres for victims of violence in the Criminal Justice System also remains a valid concern for this country.

In 1997, the Government of Botswana approved a document, Vision 2016, which takes into consideration the country's achievements after thirty years of independence and in addition formulates aspirations for the future. The document is regarded as a national manifesto for the people of Botswana and is intended to guide policy making. In this vision, seven key goals have been developed one of which directly challenges the criminal justice system, i.e. "The aspiration of a Safe and Secure Nation by 2016". To achieve this goal, the country must establish effective programmes that will assist victims within the criminal justice system.

II. LEGAL MECHANISMS FOR PROTECTING VICTIMS OF CRIME

A. The Role of the Courts

1. Reconciliation

In Botswana, courts protect victims' interests by taking into account their views. For example, not all cases brought to the court are prosecuted. The court may, upon application made by the prosecutor on behalf of the victim, promote reconciliation. This is normally done when the parties are so agreeable and the

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offence is not of an aggravated nature. The court in considering the application has to call the victim to confirm the information on the reconciliation.

Section 321 (1) of the Criminal Procedure and Evidence Act (CP & E) Cap 08:02 states:

“In criminal cases a magistrate court may, with the consent of the prosecutor, promote reconciliation, and encourage and facilitate the settlement, in an amicable way, of proceedings for assault or any other offence of a personal or private nature not aggravated in degree, on terms of payment of compensation or other terms approved by such court, and may, thereupon order the proceedings to be stayed”.

Reconciliation as a diversionary measure empowers victims to present their views and concerns where their personal interests are affected. It provides an opportunity for the victim and the offender to develop a mutually acceptable plan that addresses the harm caused by the crime. It also allows the offender to learn about the impact of the crime on the victim and to take direct responsibility for his/her behaviour. It is the duty of the court to stay the proceedings for a sufficient length of time to enable the terms of settlement to be carried out. If the accused fails to carry out the terms, then the case will proceed.

Reconciliation in criminal cases however has certain guiding principles, which the court must follow. Section 321 of the CP & E quoted above has the following guidelines developed through case law.

- (i) The court must play an active part in the reconciliation process and the decision to promote, encourage and facilitate should be made before conviction. (State v. Tawengwa [1981] BLR 264).
- (ii) If there is reconciliation before conviction, it is correct to discharge the accused with a caution. (State v. James Seven [1971-1973] BLR 59).
- (iii) Although the court may play an active role in the reconciliation process, it is not permissible for the court to initiate reconciliation. The decision to reconcile should flow from the victim (State v. James Seven [1971-1973] BLR 59).
- (iv) The reconciliation procedure is not appropriate in serious assault cases especially as in such cases the state has an interest in the prosecution. (State v. James Seven [1971-1973] BLR 59).

2. Cost, Compensation and Restitution

Victims suffer damage from crime in terms of loss of property, bodily harm and mental suffering. It is therefore important for victims to be compensated to restore the dignity and stability of their lives. In Botswana courts, after the accused has been convicted, the victim, through the prosecutor has to make a formal application for compensation and or restitution. The prosecutor must remind the victim of his/her right to apply for compensation. When the victim comes into the witness box, the prosecutor has a duty to lead him/her in a brief examination for the compensation. The court will then assess the application and either award the compensation forthwith as part of the sentence or refer the victim to a civil court.

Section 316 (1) of the CP & E provides that:

“When any person has been convicted of an offence which has caused personal injury to some other person, or damage or loss of property belonging to some other person, the court trying the case may, after recording the conviction and upon the application of the injured party, forthwith award him compensation for such injury, damage or loss.”

3. Protection of Victims from Offenders (Strict Bail Conditions)

Bail is a means of keeping the deprivation of liberty of the individual at a minimum during the period before conviction. A golden mean however, must be found between the two extremes of upholding personal freedom and guarding the interests of justice, which will suffer if the accused should abscond before trial.

Under the Botswana laws, victims are protected from offenders through tough bail conditions. Persons charged with murder, rape and treason cannot be admitted for bail. The seriousness of these offences and their impact on the victim is taken into consideration. There are also some guiding principles governing the

granting of bail. When the accused or his/her counsel makes an application for bail the prosecution may on behalf of the victim oppose such application and has to state its grounds. In deciding an issue of this nature, five considerations have to be taken into account.

- (i) The seriousness of the offence and the probability of the accused failing to appear on the day set for trial as well as the likelihood of the accused repeating the offence whilst on bail.
- (ii) The nature of the evidence in support of the charge. If the evidence is satisfactory, the accused is less likely to be released on bail.
- (iii) The independence of sureties if bail were to be granted.
- (iv) The prejudice to the accused if bail is not granted.
- (v) Possible prejudice to the state e.g. obstruction of justice (accused interfering with witnesses).

4. Arbitration

Under Botswana Customary Law, crime is viewed primarily as a conflict between individuals that results in injuries to victims and their communities and only secondarily as a conflict against the state. For some minor victimizations, therefore, the victim and the offender upon agreement can opt for a non-court dispute resolution known as 'Arbitration' facilitated by a Headman. Headmen of Arbitration are normally lay people appointed by the chief of a particular tribal area in consultation with the tribe and confirmed by the Minister of Local Government. The role of these Headmen is to protect victims and create peace in communities by reconciling the parties at stake and repairing the injuries caused by the dispute. They also act as mediators to support the healing process of the victim by offering a safe and controlled setting for the victim to meet and speak with the offender on a strictly voluntary basis to negotiate a restitution settlement.

This procedure gives the victim the opportunity to personalize the crime and express the impact it has had on him/her and his/her family. This may aid the victims' emotional recovery. Likewise, the offender is made to reflect upon the injustice he/she has done and to accept responsibility by engaging in constructive actions.

In this way, arbitration reflects the principles of restorative justice which aims to empower victims as well as deal with the parties at stake in the context of their communities and families. This procedure also provides a means of avoiding escalation of legal justice and the associated costs and delays. The victim can also obtain financial and emotional restitution quickly in an informal way.

In my opinion however, it is necessary to train arbitrators so that they can guide this process in an effective and efficient manner. Since arbitration may not address all victims' needs, research is needed to determine the impact of this process on the participants.

5. Juvenile Justice

Child victims

It is an inescapable fact that children are more vulnerable to victimization than adults because they lack the capacity to act on their own. Children, therefore, need to be treated in a manner consistent with the proportion of their sense of dignity. In Botswana, child victims are protected through the following mechanism:

- (i) Court proceedings involving children are not open to the public for protection of their privacy (section 16 of the Children's Act).
- (ii) Their right to confidentiality is guaranteed i.e. their names and addresses cannot be published without the written permission of the court (section 25 of the Children's Act).

There are however, some inconsistencies with regard to the definition of child. Botswana statutes tend to define child according to a specific purpose. The Constitution places the cut off of the age of maturity at 21, which implies that anyone below that age is a minor. According to the Children's Act, child means any person under the age of 14 years, while juvenile means a person who has attained 14 years but is under the age of

18 years. Under the CP & E, juvenile means any person under the apparent age of 18 years. Because there is no standard definition of child in Botswana, different statutes address different issues relating to child victims differently. Botswana is, however, involved in a massive review of various laws affecting the status and welfare of children with an effort to harmonise them.

The environment in the courts is not child friendly as the same personnel that sit for an adult case also sit for cases involving children except that the case is not open to the public. In my view, it is important to have judicial officers designated to preside over children's cases only. It would also be beneficial if presiding officers are adequately trained to be sensitive to child victims needs and reactions taking into consideration their age, maturity and special needs. Training of criminal justice professionals (police, judiciary and prosecutors) for full understanding of child victims' needs and reactions is very important. Such training will enable them to adequately assist children who come in the criminal justice system as offenders, victims or witnesses.

B. The Role of the Police

1. Police Organizations in Botswana

In Botswana there are two police organizations, the Central Government police and the Local Government police. The Local Police was established primarily to keep peace within the local communities, but also, as an important but secondary function, to prevent and detect crime. The Local Police are therefore widespread throughout the country while the Central Police are concentrated in urban centres and main villages. The two organizations however have the same powers.

2. How Police Protect Victims of Crime

The main reason why victims report matters relating to their victimizations is because they need to recover from the negative effects of crime, they want to prevent recurrence and where possible would like to play a role in their own recovery and protection. In Botswana, when a report is made to the police, they have to examine the complaint and find out whether the matter needs to be investigated further. In very minor cases the police may exercise their discretion to withdraw the complaint at the request of the victim. This procedure allows victims views to be incorporated in the decision whether to pursue the case further or not. In some cases the police may advise the victim to go home and settle the matter with the person against whom the complaint is made. This will normally happen in matters relating to the family where it is thought that the pursuit of the matter may break family ties. This is an informal procedure and is limited to very minor offences for example, use of insulting language or common assault. In most cases the complaint is pursued to its conclusion.

Where the victim needs immediate attention for example, medical treatment, the police will take the victim to the hospital immediately and ensure that she/he is handed over to the medical officer for necessary medical attention. Where the victim needs social support or counselling, he/she may be referred to community development officers under the ministry of Local Government. The police also work in collaboration with Non-governmental Organizations (NGO'S) such as Women's Shelter and may refer victims for counselling. Organizations such as this offer a safe haven for women and children who are abused or escaping marital rape, incest, or other gender-based violence. They also offer general and special counselling for the abused, abuser and their children and assist with medical and legal aid when needed.

Furthermore, the police also have a duty to inform victims about their rights and responsibilities. They have to advise victims on alternative courses of redress such as filing a civil case or participating in certain programmes which may aid victims in their emotional recovery for example, reconciliation, arbitration or mediation. Police also have a duty to transport and accompany victims to court. All these processes are part of police duties which they are expected to perform without supervision. Most police stations have improved facilities to cater for victims of crime especially sexual crimes. There are also improved procedures for handling victims of crime. For example, female rape victims are interviewed by female police officers.

3. Protecting Victims of Violent and Sexual Offences

Violence takes many forms and can have a more detrimental effect on victims. In Botswana, The

movement for protection of rights of women and children has contributed a great deal to the awareness and concerns of victims of violence by advocating and lobbying for amendments of laws discriminating against women. Leaders of this movement have also created civil society networks to address the needs of women who are subjected to violence. As a result of concerns regarding the high prevalence of rape and sexual abuse of women and girls, criminal laws relating to sexual offences were reviewed. These concerns were reinforced by police statistics, which shows that in 2002, 303 cases of defilement of persons under 16 years were recorded, compared to 237 in 2002 representing an increase of 27.8%. A total of 1506 rape cases were recorded in 2003 compared to 1473 in 2002 representing an increase of 2.2% (Police Annual Report 2003).

Research carried out by the Women's Affairs Department revealed that the public feeling was that the laws as well as their enforcement were inadequate. It was also noted that women often failed to report cases of rape because of the embarrassing legal procedures they had to go through at the police station, the hospital and the court. (Report on Review of all Laws affecting Status of Women in Botswana, WAD 1988). The following amendments have been made:

- (i) The new definition of rape has made the offence gender neutral to protect not just female victims but male victims as well. Section 141 of the Penal Code provides that:

“Any person who has unlawful carnal knowledge of another person, or who causes the penetration of a sexual organ or instrument, of whatever nature, into the person of another for the purposes of sexual gratification, or who causes the penetration of another person's sexual organ into his or her person, without the consent of such person, or with such person's consent if the consent is obtained by force or means of threats or intimidation of any kind, by fear of bodily harm, or by means of false pretences as to the nature of the act, or in the case of a married person, by personating that persons' spouse, is guilty of the offence termed rape and is liable to a maximum term of imprisonment for life”.

- (ii) The Criminal Procedure and Evidence (Amendment) Act of 1997, allows testimonies to be held in camera providing some relief from trauma for victims during a rape trial.
- (iii) The Penal Code (Amendment) Act of 1998, introduces stiffer penalties against rape offenders. A person charged with rape is not entitled to bail, and on conviction shall be sentenced to a minimum term of ten years imprisonment.
- (iv) Where the rape is accompanied by violence resulting in injury to the victim, the minimum sentence is fifteen years.
- (v) A person convicted of rape is required to undergo an HIV/AIDS test before sentence is passed, and if he/she tests positive shall be sentenced to a minimum term of fifteen years. Where it is proved that on a balance of probabilities such person was aware of being HIV positive, h/she shall be liable for a minimum term of twenty years with corporal punishment. The problem with implementing this requirement is finding proof that the convict may have known his/her status or not.

Human rights activists have challenged the provision which denies a person charged with rape bail on the grounds that it violates the accused person's constitutional right of being presumed innocent until proven guilty beyond reasonable doubt. The courts, however, have thrown out this contention. There is also a growing concern that although the definition of rape is now gender neutral, in reality it is women who have been, and will continue to be victims of rape due to unequal relations of power between women and men (WAD 1998).

The fact that rape trials are conducted in accordance with the normal procedures under the CP & E Act, which requires corroboration of the victim's allegation that he/she has been raped, and is subjected to the normal criminal standard of proof beyond reasonable doubt, causes some problems. Rape offences are committed in private and there are usually no witnesses to provide direct evidence to corroborate the victim's allegation. Courts therefore have to rely on circumstantial evidence such as medical reports, which show evidence of sexual intercourse, which is not always helpful because it means the victim should be examined immediately following the rape. Most women are not aware of these requirements and it is

common for them to clean themselves thereby removing evidence (WAD 1998). It is therefore noted that the holding of rape cases in camera may not necessarily solve the problem as long as the legal requirements regarding the burden of proof remain the same.

III. VICTIM PARTICIPATION IN THE CRIMINAL JUSTICE PROCESS

A. The Legal Response

1. The Right of Complaint for the Victim

In Botswana, every person whose human rights are violated has the right to recourse under the Constitution. An example is the landmark case of Attorney General v. Unity Dow, Civil appeal no. 4/91. In this case, the appellant, a lawyer and human rights activist caused the Government of Botswana to repeal certain sections of the Citizenship Act and replace them with gender neutral provisions through a lawsuit.

Victims of crime have the opportunity to participate in criminal proceedings in a number of ways other than testifying as witnesses. For example, they can request the withdrawal of cases of minor violations and their request will be noted and considered. Victim involvement in decision making requires that victims be kept aware of the developments in the case. The investigating officer has a duty to update the victim on the progress of the investigation and document such information. This responsibility is passed on to the prosecutor along with the case file. This procedure assures the victim that something is being done about his/her complaint and gives him/her more possibilities for participation. It is very important that victims of crime are continually updated on the progress of the case as their experience of crime is the individual violation of their rights. Failure to update victims may make them feel left out of the criminal justice process.

At the close of the trial, the prosecutor is allowed to address the court before judgment on behalf of the victim. In his/her closing remarks the prosecutor will plead with the court to consider the impact of crime on the victim and society in general. In my view however, this procedure would be more meaningful if the victim is given the chance to address the court by himself/herself, explaining to the court the pain, anguish and financial devastation that the crime has caused in his/her own words.

2. Private Prosecution

Generally, public prosecution in Botswana is vested in the Attorney General who may appear personally or delegate other persons to prosecute (Section 7 of the CP & E). Where the Attorney General declines to prosecute, any private party who can show some substantial and peculiar interest in the issue of the trial, arising out of injury, which the individual has suffered by the commission of the offence, may prosecute in any court of competent jurisdiction (Section 14 of the CP & E). Sections 15 and 16 of the same Act further state other persons and bodies who possess the right to prosecute.

- (i) A husband in respect of offences committed against his wife.
- (ii) The legal guardian or curators of minors or lunatics in respect of offences committed against these persons.
- (iii) The wife or children or any next of kin of the deceased person in respect of any offence by which the death of such person is alleged to have been caused.
- (iv) Any public body upon whom the right to prosecute is expressly conferred by law.

Private prosecution accords the victim the opportunity to participate in the prosecution process especially in matters of personal concern. It may also serve as a good mechanism for victim protection from secondary victimization in the criminal justice system. Private prosecution however may be very expensive due to high costs of litigation and lack of investigation facilities and capabilities on the part of the victim.

3. Appeal

As a way to safeguard the victim's rights and allow victims to participate in decisions that affect them, the Botswana Justice system has structured appeal procedures. As a general rule, a litigant who is dissatisfied with the decision of the court may appeal to a higher court within thirty days. Appeals may be against conviction or sentence. The appellant has to satisfy the court that his/her appeal is competent once this is challenged.

IV. MEASURES TO PREVENT ABUSE OF POWER

A. Statutory Provision

1. The Constitution

The Botswana Constitution imposes limitations on the powers of various criminal justice agencies. It is important for these powers to be limited to prevent abuse. It has been said that power corrupts but that absolute power corrupts absolutely. Section 7 of the Constitution provides that “no person shall be subjected to torture or to inhuman or degrading punishment or other treatment”. An example is the case of Modi and Desai v. State.

The accused persons were convicted and sentenced to a mandatory punishment under the Habit Forming Drugs Act. They appealed against sentence on the grounds that the sentences were inhuman and degrading. There was a provision that persons convicted under the Act, should receive a mandatory punishment of ten years imprisonment, a fine of P1500.00 or in default of payment to be imprisoned for three years and given corporal punishment. The court of appeal held that the totality of the sentences were indeed inhuman and degrading.

2. Provision to Secure Protection of Law

Prevention of secondary victimization by the criminal justice process is important for victim support. Section 10 of the Constitution outlines some elements of a fair trial, which the courts must follow. The section provides that ‘If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established or recognized by law’. What is a reasonable time in any particular case will turn on the circumstances of that case, but it is clear that any ostensibly undue delay will place the burden of justifying it on the prosecution.

3. Elements of a Fair Trial

- (i) Trial by an independent and impartial Court – It is of fundamental importance that justice should not only be said to be done but should manifestly and undoubtedly be seen to be done. The rule that ‘no man can be a judge in his own cause precludes a judicial officer who is interested in the subject matter of a dispute from acting as a judicial officer therein.
- (ii) Trial in public – the way that courts behave should not be hidden from the public eye and ear as a safeguard against judicial arbitrariness and to maintain confidence in the administration of justice.
- (iii) Legal representation – any person charged with an offence shall be permitted to defend him/herself before the court, at his/her own expense by a legal representative of his/her choice.
- (iv) Trial in the language understood by the accused – the accused shall be permitted to have without payment the assistance of an interpreter if he/she does not understand the language of the court.
- (v) Calling witnesses – the accused has the right to call defence witnesses and also cross-examine state witnesses.
- (vi) Addressing the court before judgment – accused shall be allowed to address court before judgment.

The government of Botswana has also established the Directorate on Corruption and Economic Crime, an operationally independent Department to prevent and investigate corruption and economic crime. As a further measure to prevent maladministration in the affairs of government, the office of the Ombudsman has been established to investigate any improper conduct by persons performing a public function and where necessary recommend a remedial action.

4. Police Powers

In Botswana, police powers of arrest, search, seizure and detention can only be exercised within the limits of the law. A police officer who abuses his power can be subjected to a disciplinary proceeding before a court marshal (disciplinary court).

5. Code of Professional Conduct

The code sets out the principles, which guide police officer's conduct. It does not seek to restrict officers' discretion; rather it aims to define the parameters to conduct within which that discretion can be exercised. Any breach of the principles of the code may result in action being taken, which in serious cases could involve dismissal.

6. Police Training in Relation to Protection of Victims

Police officers, as front line officers in the battle against crime, need to be well trained to enable them to be sensitive to the needs of victims and to place a high priority on protecting victims from intimidation and physical harm after they report a crime. In an effort to fulfil this, the Botswana Local Police Service has the following programmes taught at an initial stage i.e. for newly employed officers and for in-service courses as well.

(i) Professionalism & ethics

This training is intended to equip officers with skills to help them act professionally no matter how they feel since they represent the government and have an obligation to set an example to the communities they serve. Topics covered include:

- a) Principles of fairness
- b) Rules of Natural Justice
- c) Police Code of Conduct

(ii) Human rights and policing

Given the nature of police work, which sometimes forces officers to step into citizen's rights for example, use of force in effecting an arrest, and the fact that policing is a highly discretionary activity, officers can easily step outside their legal mandate. This training is intended to assist officers to deal with their day to day challenges and the following topics form part of the subject:

Fundamental rights and freedoms of the individual

- Treating victims with compassion and respect for their dignity
- Information on available courses of redress
- Assist victims as promptly as possible
- Referral for post-trauma counselling

V. CONCLUSION

It is evident from the discussion that the Criminal Justice Process of Botswana is doing all it can to protect victims of crime and abuse of power.

While efforts have been made to amend various laws, it is evident that a lot needs to be done to structure procedures. The law regarding corroboration of victims' evidence in rape cases remains a source of contention as it places a heavier burden on the prosecution. The effect of this requirement is that the victim is made to feel like a suspect where the burden is on him/her to prove that he/she did not consent to acts of intercourse.

The Constitution as the 'mother law' of the country should have provisions that apply directly to children, taking into consideration their age, maturity and special needs. Children's views must be given particular weight in the course of proceedings concerning their well being. In order to give the effect of international standards, there should be some form of differentiated juvenile court. Criminal justice officials should be trained to best handle child issues.

Overall, the Criminal Justice Process of Botswana is heading in the right direction but needs to do a little more in order to fulfil the aspiration of a safe and secure nation by 2016.